(8)

No. 96-6839

Supreme Court of the United States

OCTOBER TERM, 1996

HUGO ROMAN ALMENDAREZ-TORRES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER HUGO ROMAN ALMENDAREZ-TORRES

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INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia non-profit corporation whose membership is comprised of more than 9,000 lawyers and 28,000 affiliate members representing every state. Members serve in positions bringing them into daily contact with the criminal justice system in the state and federal courts. Members of the NACDL regularly represent defendants charged in federal courts.

The NACDL is the only national bar organization working on behalf of public and private defense lawyers. The American Bar Association recognizes the NACDL as an affiliated organization and awards it full representation in the ABA House of Delegates. The NACDL is dedicated to the preservation and improvement of our adversary system of justice. The Amicus Curiae Committee of the NACDL has discussed this case and decided this issue is of such importance to defense lawyers throughout the nation that the NACDL should offer its assistance to the Court.[1]

The importance of this case to the NACDL membership

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[1]In accordance with Supreme Court Rule 37(6), counsel certifies that no counsel for a party authored this brief, and no person or entity other than the amicus curiae made a monetary contribution to the preparation or submission of this brief.

derives from several major interests. First, the case affects a large and growing class of defendants and potential defendants. Since 1991, the number of persons sentenced for Section 1326 violations has increased each year from 715 to 2,945.[2] The overwhelming majority of the Section 1326 sentences were imposed in the Ninth Circuit.[3] A ruling adverse to the Ninth Circuit's recognition of the statutory elements would affect charging practices and trial issues for great numbers of defendants.

The persons affected are also unusually vulnerable to excessive punishment. As aliens illegally in the country, they constitute a

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[2]According to the United States Sentencing Commission's data, the increase in both raw numbers sentenced under Section 1326 and as a percentage of all persons sentenced was as follows:

1991	715	2.1%	1994	1,389	3.5%
1992	757	2.0%	1995	2,032	5.3%
1993	1,066	2.5%	1996	2,945	6.9%

The statistical information here and elsewhere in the brief is derived from public information maintained by the Sentencing Commission. U.S. Sentencing Commission, 1991-96 Datafiles, MONFY 91-96.

[3]The yearly totals in the Ninth Circuit in raw numbers and as a percentage of overall Section 1326 sentencings are as follows:

1991	399	53.1%	1994	810	58.3%
1992	396	52.3%	1995	1,262	62.1%
1993	602	56.9%	1996	1,835	62.3%

despised subgroup. Their criminal and alien status not only excludes them from the political system but makes them a lightening rod for fear and anger. This political vulnerability is reflected in the flurry of legislation in this area. For many years, Section 1326 remained untouched as a seldom-invoked, two-year, malum prohibitum status offense. Since 1988, the statute has been amended to increase the statutory maxima for those with felony convictions, first to five and fifteen years, then to ten and twenty years. The Sentencing Guidelines have been amended accordingly. While such legislative decisions are not at issue, judicial procedures and the scope of prosecutorial discretion should apply fairly to these outlanders.

The preservation of traditional rights is also at issue in this case. The Fifth Amendment right to indictment and the due process right to proof of each element of the offense beyond a reasonable doubt are diminished by the view of the Fifth Circuit.

The parties have consented to the filing of this amicus curiae brief. Consent letters from the parties have been forwarded to the Clerk of the Court.

SUMMARY OF ARGUMENT

The plain meaning of Section 1326 defines separate offenses

in subsections (b)(1) and (b)(2), requiring pleading and proof beyond a reasonable doubt. The statute incorporates by reference using the phrase "any alien described in such subsection" to state all the elements of a separate offense in each subsection. The statute itself provides nothing to detract from the traditional view that each ingredient of the offense must be pleaded and proved at trial.

The plain meaning view is strongly reinforced by the context and structure of the statute. The adjacent statute, Section 1325, contains two levels of punishment, the greater of which depends on a prior conviction which must be pleaded and proved beyond a reasonable doubt. Congress referred to subsection 1326(b) as an "offense" in subsequent legislation. The complexity of factual and legal questions to establish "subsequent to a conviction" and "aggravated felony" under immigration law militate in favor of a requirement of pleading and proof beyond a reasonable doubt.

The Ninth Circuit, from which over half the Section 1326 cases are prosecuted, views subsection 1326(b) as enumerating separate offenses. A ruling contrary to the Ninth Circuit position undercuts the separation of powers doctrine and the imperative to afford the executive branch the full range of its discretion in charging decisions and plea

negotiations. An array of policy considerations guide prosecutors' decisions whether and how to charge an illegal reentry case. Prosecutorial discretion is inappropriately limited by the stark options of no prosecution or the alternatives of a petty offense or the twenty-year maximum.

Traditionally, each fact that must be established to impose the maximum punishment must be charged as an element under the Fifth Amendment's Indictment Clause and proved beyond a reasonable doubt under the Fifth Amendment's Due Process Clause. The statute should not be construed to dilute the historical interposition of the grand jury and the protections of pleading and proof beyond a reasonable doubt.

ARGUMENT

IN THE STATUTE DESCRIBING CRIMES OF ILLEGAL REENTRY AFTER DEPORTATION, THE PHRASES "SUBSEQUENT TO A CONVICTION FOR COMMISSION OF A FELONY" AND "SUBSEQUENT TO A CONVICTION FOR COMMISSION OF AN AGGRAVATED FELONY" DESCRIBE ELEMENTS OF THE OFFENSE WHICH MUST BE PLEADED BY INDICTMENT AND PROVED BEYOND A REASONABLE DOUBT.

A. The Plain Meaning Of The Statute: Subsections (b)(1) And (b)(2) Describe Separate Offenses.

In construing a statute, its plain meaning is the guiding

principle. *United States v. Gonzales*, 117 S.Ct. 1032, 1034 (1997); *Bailey v. United States*, 116 S.Ct. 501, 506 (1995). When the text speaks with clarity to an issue, in all but the most extraordinary circumstances, inquiry into the meaning of the statute is complete. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989); *Rubin v. United States*, 449 U.S. 424, 430 (1981).

Section 1326 on its face creates separate offenses in subsection (b). Subsection 1326(a) describes certain aliens in subparagraphs (1) and (2). Subsection 1326(b), as added in 1988, stated:

> (b) Notwithstanding subsection (a) of this section, in the case of *any alien described in such subsection*--
>
> (1) whose deportation was subsequent to a conviction for commission of a felony (other than an aggravated felony), such alien shall be . . .
>
> (2) whose deportation was subsequent to a conviction for commission of an aggravated felony, such alien shall be . . . . (emphasis added).

Incorporation by reference, using phrases such as "described in such subsection," is a standard tool of legislative drafting. Indeed, the immigration laws are rife with incorporations by reference.[4] The

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[4]The immigration statutes, past and present, use the word "described" hundreds of times to incorporate lengthy passages by reference.

adoption of an earlier statute by reference makes it as much a part of the later act as though it had been incorporated at full length. *Engel v. Davenport*, 271 U.S. 33, 38 (1926); *Kendall v. United States ex rel. Stokes*, 12 Pet. (37 U.S.) 524, 625 (1838).

The statute states on its face (with the incorporation highlighted):

> (b) Notwithstanding subsection (a) of this section, in the case of any alien *who*
>
> *(1) has been arrested and deported or excluded and deported, and thereafter*
>
> *(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,*
>
> *[3]* whose deportation was subsequent to a conviction for commission of a felony (other than an aggravated felony), such alien shall be fined under Title 18, imprisoned not more than 5 years, or both;
>
> *[4]* whose deportation was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such Title 18, imprisoned not more than 15 years, or both.

The statute unambiguously states separate elements, the addition of which increase the maximum punishments. All the elements of the offense are in subsection (b) itself. There is no suggestion of any other approach.

B. The Structure And Context Of The Statute Establish That Subsections (b)(1) And (b)(2) Describe Separate Offenses.

The statutory structure and context of Section 1326 support the conclusion that each subsection states a separate offense. *See Bailey*, 116 S.Ct. at 505-06; *Hubbard v. United States*, 115 S.Ct. 1754, 1758 (1995). Judicial construction of Section 1325, substantially predating the creation of subsection (b), established that prior convictions had to be pleaded and proved beyond a reasonable doubt. The same pattern is followed in subsection 1326(b). The unique Immigration and Naturalization Service definitions of "conviction" and "aggravated felony" militate in favor of treating the separate facts as necessary elements of the offenses, as does subsequent legislation.

1. The Parallel Statute, Prohibiting Evasion Of INS Inspection, Treats The Prior Conviction As An Element Of The Offense.

At the same time it first enacted Section 1326, Congress

created in their present form parallel crimes for entering without inspection, regardless of prior deportation. 8 U.S.C. §1325 (1994) (amended 1996). This statute includes an increase in the statutory maximum from six months to two years "for a subsequent commission of any such offense, ..."

The Ninth Circuit, by a panel including now-Justice Kennedy, found that the government's failure to prove a prior "conviction" foreclosed the two-year offense. *United States v. Arambula-Alvarado*, 677 F.2d 51, 52 (9th Cir. 1982). Applying the Supreme Court's requirement that criminal statutes must be narrowly construed in favor of the accused, the court held that "[a]bsent proof of a former 'conviction,' the appellant should not have been given a felony sentence." *Id.*

The Ninth Circuit clarified its Section 1325 decision, holding that proof of the "conviction" did not require a certified copy of the judgment; other evidence could suffice. *United States v. Arriaga-Segura*, 743 F.2d 1434 (9th Cir. 1984). In doing so, the court reinforced the holding that the prior conviction was an element of the offense: "The Government clearly must prove beyond a reasonable doubt more than 'a subsequent commission of any such offenses'; it

must prove an actual conviction." *Arriaga-Segura*, 743 F.2d at 1436.

Separate offenses have been applied in practice for years. When Congress promulgated subsection (b) in 1988, the legislature is presumed to have known the judicial interpretations of the sister statute and intended a consistent reading. *See generally Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979); 2B Norman J. Singer, SUTHERLAND STAT. CONST. §51.01-03 (5th ed., 1992 and 1996 Supp.) (interpretation by reference to related statutes). The prosecutors and courts in the Ninth Circuit proceeded to apply the Section 1325 construction to Section 1326 without difficulty.[5]

2. The Ninth Circuit Has Consistently And Rationally Interpreted Subsection 1326(b) As Creating Separate Offenses Based On The Plain Meaning Of The Statute, Construction Of The Statute With Section 1325, And Prosecutorial Charging Practices.

The Ninth Circuit first addressed subsection 1326(b) in connection with the charging policy of the United States Attorney's office in the Southern District of California. The government initially charged the defendant, Mr. Arias-Granados, with reentry following a

[5]The government, in its opposition to certiorari in this case, noted the easy observance of the Ninth Circuit separate-offenses interpretation of subsection 1326(b). Brief of the United States in Opposition at 11.

deportation subsequent to a felony conviction, a "crime" then punishable by a statutory maximum of five years. *United States v. Arias-Granados*, 941 F.2d 996, 997 (9th Cir. 1991). Pursuant to plea negotiations, Mr. Arias-Granados entered a guilty plea "to one count of 8 U.S.C. §1326(a), simple reentry after deportation," punishable by a maximum of two years incarceration. 941 F.2d at 997. The parties and the court treated the offenses as separate.

The only issue on appeal was whether the sentencing guidelines should still reflect the higher punishment within the statutory maximum based on the higher guideline for reentry after a felony conviction. The court approved the exercise of charging discretion -- "A prior felony conviction is an element of the crime with which appellants were charged, 8 U.S.C. §1326(b)(1), but is not an element of the crime to which they pleaded guilty, 8 U.S.C. §1326(a)" -- and affirmed the sentences based on the applicability of the guideline enhancement as relevant conduct under U.S.S.G. §1B1.3(a)(4). *Arias-Granados*, 941 F.2d at 998. The court drew a clear line between charging discretion that limited the statutory maximum and application of the guideline range within that maximum sentence. *Id.*

Plea bargaining practice regarding different charges came

before the Ninth Circuit again in *United States v. Campos-Martinez*, 976 F.2d 589 (9th Cir. 1992). There, the defendant pleaded guilty to an indictment with no allegation of a prior conviction. The defendant asserted the failure to plead the element of subsection 1326(b)(1) that would increase the statutory maximum foreclosed a sentence in excess of two years. The Ninth Circuit agreed.

The court found the statutory interpretation in *Arias-Granados* was correct that "subsections 1326(a) and 1326(b)(1) describe different crimes with different elements and maximum sentences." *Campos-Martinez*, 976 F.2d at 591. The court also found that Section 1325, which the government conceded stated two separate offenses distinguished by a prior conviction, supported its interpretation of the face of the statute: "Sections 1325 and 1326 form the core of the illegal entry prohibitions of the United States Code, and both statutes provide that a previous criminal conviction may result in a longer sentence." *Campos-Martinez*, 976 F.2d at 591.[6] The court held the "indictment must include the element that the person was convicted of a prior felony." *Campos-Martinez*, 976 F.2d at 592.

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[6]The court interpreted the statutes consistently based on similarities "in structure, operation, purpose, and subject matter." *Campos-Martinez*, 976 F.2d at 592.

In *United States v. Gonzalez-Medina*, 976 F.2d 570 (9th Cir. 1992), three defendants went to trial on indictments in the District of Washington that did not charge any prior offenses. The government did not plead or prove the requisite facts for a subsection 1326(b)(1) or (b)(2) offense. The court held that "the three subsections identify different crimes, the elements of which must be proven at trial and not simply at sentencing." *Gonzalez-Medina*, 976 F.2d at 571. In doing so, the court relied heavily on its earlier ruling in *Arias-Granados*, holding that "[b]ecause sections 1326(a) and 1326(b)(1) (and, a fortiori, 1326(b)(2)) constitute separate crimes -- and not merely a single offense with different sentencing criteria -- the government was obligated to put on evidence of the defendants' prior felony convictions if it intended to prosecute them under subsection 1326(b) instead of the lesser included offense of 1326(a)." *Gonzalez-Medina*, 976 F.2d at 572.

In the court of appeals with jurisdiction over the most felony Section 1326 prosecutions, the language and context of the statute establish that "§1326(a) and (b) stand alone, each with its own elements and sentencing provisions." *United States v. Oliver*, 60 F.3d 547, 553-54 (9th Cir. 1995). Recently, the Ninth Circuit reinforced its

view of the statute *en banc* when it upheld the dismissal of an indictment under subsection 1326(b)(2) for failure to properly allege an aggravated felony. *United States v. Gomez-Rodriguez*, 96 F.3d 1262, 1265 (9th Cir. 1996) (en banc).

3. The Unique And Complex Proof Requirements Regarding "Convictions" And "Aggravated Felonies" Under INS Law Militate In Favor Of Treatment Of Subsection (b) As Stating Separate Offenses.

At the time Congress promulgated subsection (b), immigration law provided unique and complex potential grounds for defenses which militate in favor of requiring pleading and proof beyond a reasonable doubt. Under applicable immigration law, a "conviction" was not final unless all appeals were exhausted or the period to appeal had expired. Further, amendments to the definition of "aggravated felony" created factual questions regarding charging and proof.

a. The finality of a conviction under subsection 1326(b) is a potentially complex question of law and fact.

Under subsection 1326(b), the increase in maximum sentence applies only where the deportation is "subsequent" to a felony or aggravated felony. In *Marino v. INS*, 537 F.2d 686, 691 (2d Cir. 1976), the court provided a narrow definition of "convicted" under the immigration laws:

> [A]n alien is not deemed to have been "convicted" of a crime under the Act until his conviction has attained a substantial degree of finality...such finality does not occur unless and until direct appellate review of the conviction (as contrasted with collateral attack) has been exhausted or waived.

The INS adopted regulations applicable to immigration crimes codifying the case law.[7] The agency's construction of the term is entitled to deference. *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984).[8]

The question whether the deportation is "subsequent" to a conviction becomes a relatively complex factual question. If, for example, the deportation follows quickly upon the imposition of a sentence to time served or probation, the conviction will not be final at

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[7]53 Fed.Reg. 9,281, 9,298 (March 28, 1988) (codified in 8 C.F.R. §242.2(b) (1989)).

[8]Congress adopted a new version of "conviction" in 1996. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub.L. No. 104-208, §322, 110 Stat. 3009-1570, 3009-1703 (1996) (codified at 8 U.S.C. §1101(a)(48) (1996)). The INS later withdrew 8 C.F.R. §242.2(b). 62 Fed.Reg. 10,312, 10,382 (March 6, 1997). The new definition would not apply to Mr. Almendarez under the Ex Post Facto Clause. The importance of the earlier definition of "conviction" is the light it sheds on the offenses created by Congress in 1988 by promulgating subsection (b).

the time of the deportation because the time within which to appeal may not have expired.

If an appeal is filed, the conviction may not become final for months, or years, while the case wends its way through the appellate courts. In fact, there is nothing in the record before this Court to establish that Mr. Almendarez's burglary convictions were not appealed and still pending at the time of his deportation.

The need to focus the parties and the court on when the judgment was final, and on the potential "subsequent" defenses, militates in favor of treating as an element facts which may result in a much lower statutory maximum.

b. Whether a felony is "aggravated" under subsection 1326(b)(2) is a potentially complex question of law and fact.

An additional factual matter raised in subsection 1326(b) is whether the prior offense is a felony or an aggravated felony. Congress provided a definition of aggravated felony at 8 U.S.C. §1101(a)(43) (1996). The definition of aggravated felony has changed several times

since the promulgation of 8 U.S.C. §1326(b).[9] The Ex Post Facto Clause, as well as the statutory effective date, limit prosecutions where the "aggravated felony" definition becomes broader, and inclusive of the defendant, subsequent to the commission of the offense.[10] The function of focusing both the prosecution and the defense on the question by formal notice and proof beyond a reasonable doubt favors consideration of the fact -- "aggravated felony" -- as an element of the offense.[11]

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[9]In 1988, the initial definition generally included murder, drug trafficking, and weapons trafficking. Pub. L. No. 100-690, §7342, 102 Stat. 4469, 4469-70. In 1990, the definition expanded to include crimes of violence for which a term of at least five years imprisonment was imposed. Immigration Act of 1990, Pub. L. No. 101-649, §501, 104 Stat. 4978, 5048. In 1996, the definition was once again altered to be more expansive. Antiterrorism And Effective Death Penalty Act Of 1996, Pub. L. No. 104-132, §440(e), 110 Stat. 1,259, 1,277.

[10]*See, e.g., United States v. Gomez-Rodriguez*, 96 F.3d 1262 (9th Cir. 1996) (en banc); *United States v. Munoz-Cama*, 47 F.3d 207, 208-09 (7th Cir. 1995).

[11]The need for notice and attention to this element in a criminal case is especially important for three reasons: 1) INS law is a specialty area not easily accessible to the uninitiated; 2) Section 1326 defendants are almost always unable to retain private immigration lawyers; and 3) the numbers of immigration specialists available through the Criminal Justice Act is limited.

4. Subsequent Immigration Legislation Supports The Requirement Of Pleading And Proof Of Subsections (b)(1) And (b)(2).

In 1996 Congress added subsections (b)(3) and (b)(4) to Section 1326.[12] Each creates a new offense, mirroring the patterns of subsections (b)(1) and (b)(2). The only difference is that, because of minor changes in the description of the aliens, incorporation by reference is not used. The subsequent legislation demonstrates the legislative view of the relevant factors as elements of the offense.

Further, in 1996 Congress directed the Sentencing Commission to address the new statutory maxima for subsection 1326(b) violations created in 1994. In doing so, Congress referred to subsections 1326(b)(1) and (b)(2) as "offenses."[13] Although subsequent to enactment, the reference reflects the view that the subsections are separate crimes.

In the 1996 amendments, Congress used "penalties" in a broad, generic sense denoting the consequences of punishable offenses consisting of a number of elements. 8 U.S.C. §1326(c). This sheds

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[12]Pub. L. No. 104-132, §401(c), 110 Stat. 1258, 1268; Pub. L. No. 104-208, §305, 110 Stat. 3009-1570, 3009-1666.

[13]H.R. Conf. Rep. No. 104-828, §334(a) (1996).

light on the use of the Section 1326 title of "criminal penalties for certain deported aliens." Rather than indicating a penalty section, "penalty" is used, as it is throughout immigration statutes, in its general sense. This supports the suggestion that some courts have read too much into the title:

> The bifurcated structure of §1326 and the apparent incorporation of the elements of subsection (a) into subsection (b) might also suggest that Congress intended the broad title of the offense ("reentry of deported alien") to apply to both separate offenses in the different subsections.

United States v. Forbes, 16 F.3d 1294, 1298 (1st Cir. 1994) (citing *United States v. Vasquez-Olvera*, 999 F.2d 943, 949 (5th Cir. 1993) (King, J., dissenting)); *see also United States v. Vieira-Candelario*, 811 F.Supp. 762, 767 (D.R.I. 1993).

C. The Separation Of Powers Doctrine And Traditional Respect For Full Prosecutorial Discretion In Charging Decisions Support Construction Of Subsections (b)(1) And (b)(2) As Separate Offenses.

Congress intended to create separate offenses in subsections (b)(1) and (b)(2) to facilitate the full exercise of prosecutorial discretion. Prior to 1988, the only cases construing Section 1325 treated the two offenses as separate and amenable to the exercise of

prosecutorial discretion. The full range of charging discretion is especially appropriate where many more people are guilty of the status offense than can be processed through the courts or housed in the prisons. Under both the constitutional separation of powers doctrine and the statutory approval of prosecutorial discretion, Congress gave full powers to the executive branch to carry out the laws.

The executive branch has exclusive discretion to decide whether and how to prosecute a case. *United States v. Armstrong*, 116 S.Ct. 1480, 1486 (1996); *United States v. Nixon*, 418 U.S. 683, 693 (1974). This discretion includes whether to bring a charge with a higher or lower statutory maximum. *United States v. Batchelder*, 442 U.S. 114, 124 (1979). The use of charge bargaining has been specifically endorsed by this Court as "an essential component of the administration of justice." *Santobello v. New York*, 404 U.S. 257, 260 (1971).

Exercise of charging discretion in the resolution of cases is explicitly endorsed in and contemplated by the relevant statutes and sentencing guidelines. The Federal Rules of Criminal Procedure anticipate that the dismissal of charges may result from plea agreements. Fed. R. Crim. P. 11(e)(1)(A). The Sentencing Guidelines

expressly contemplate that, as a result of charging discretion, the statutory maximum may become the guideline sentence, regardless of the applicability of a higher guideline range. U.S.S.G. §5G1.1(a) (1995). The Sentencing Commission specifically recognized that oversight of agreements calling for dismissal of charges or an agreement not to pursue potential charges "does not authorize judges to intrude upon the charging discretion of the prosecutor." U.S.S.G. §6B1.2, comment. (1995).[14]

The radical changes in criminal immigration law have required creative prosecutorial approaches. For decades, many thousands of aliens have been deported. Many thousands of these aliens returned to the United States, drawn by financial need, family connections, and -- sometimes -- the desire to continue criminal activities. Prior to 1988, with a two-year maximum sentence for reentry and parole guidelines substantially lower, prosecutors generally brought charges in only the most aggravated cases. These were easily disposed of as mala

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[14]With respect to plea negotiations, the Commission basically left matters as they were when the guideline system was promulgated. *See* William W. Wilkins, Jr., and John R. Steer, *Relevant Conduct: The Cornerstone Of The Federal Sentencing Guidelines*, 41 S.C.L.Rev. 495, 499 (1990); Stephen Breyer, *Federal Sentencing Guidelines And The Key Compromises Upon Which They Rest*, 17 Hofstra L.Rev. 1, 30 (1988).

prohibita, regulatory-type offenses.[15]

The stakes were substantially increased in 1988 with the creation of the crimes of reentry after a felony, punishable by a maximum of five years incarceration, and reentry after an aggravated felony, punishable by a maximum of fifteen years incarceration. Shortly thereafter, the statutory maxima were increased to ten years and twenty years, respectively, transforming the offenses from Class E felonies to Class C felonies. 18 U.S.C. §3559(a)(3) and (b). Prosecutors had to decide how to allocate scarce resources where prison beds would be unavailable to other offenders; an almost bottomless source of potential defendants waited in prisons and neighborhoods, as well as at the border; and defendants facing terms of many years in prison were more likely to litigate fully.

Further complicating the prosecutor's decision is the vast array of factual settings. For example, there is no temporal limitation on the prior deportation, so an alien who has lived lawfully in the country with his family for thirty years after a probationary sentence for a small drug

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[15]*United States v. Pena-Cabanillas*, 394 F.2d 785, 788-89 (9th Cir. 1968) (Section 1326 is a regulatory statute that describes a "typical mala prohibita offense"), *accord United States v. Henry*, 111 F.3d 111, 113-14 (11th Cir. 1997) (citing cases); *but see United States v. Anton*, 683 F.2d 1011 (7th Cir. 1982) (lone circuit requiring proof of criminal intent).

transaction is treated under the Guidelines the same as a bank robber who made express threats of death during the robbery.[16] The INS practice of scouring state jails and prisons for previously-deported aliens frequently results in mandatory, consecutive federal sentences because the Guidelines provide for concurrency or partial concurrency only where the former sentence is unexpired. U.S.S.G. §5G1.3 (1995). Aliens themselves are uniformly confused and incredulous regarding the time they face -- in fact, for several years after the change in the law, official Immigration and Naturalization forms erroneously listed the maximum sentence for reentry as being only two years imprisonment.[17]

Because Congress created separate crimes, the exercise of charging discretion provides a solution for the very limited number of

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[16]*Compare* U.S.S.G. §2B3.1(a), (b)(1), and (b)(2)(F) (1995) *with* U.S.S.G. §2L1.2(a) and (b)(2) (1995).

[17]The circuit courts of appeals have uniformly held that the INS's erroneous advice in the Form I-294 regarding the statutory maximum is neither a defense nor a basis for downward departure. *See, e.g., United States v. Thomas*, 70 F.3d 575, 576 (11th Cir. 1995), *cert. denied*, 116 S.Ct. 1370 (1996); *United States v. Cruz-Flores*, 56 F.3d 461, 463-64 (2d Cir. 1995) ("However inexcusable it may have been for the government to continue to use outdated notices, every circuit court to consider this issue has found that receipt of an erroneous Form I-294 does not provide a basis for limiting a defendant's sentence to two years"); *United States v. Ullyses-Salazar*, 28 F.3d 932, 936-37 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 1367 (1995).

cases that could otherwise be prosecuted to the full extent of the law. In several districts, United States Attorneys have implemented programs whereby many more aliens can be prosecuted by making an early and desirable guilty plea available. In the District of Oregon and the Southern District of California, the United States Attorneys responded to the large number of potential illegal reentry cases by charging a lesser offense in exchange for rapid dispositions.[18] The Ninth Circuit has expressly approved the Southern District of California "fast track" policy:

> In light of the overall crime problem in the Southern District of California, the government chose to allow §1326(b) defendants the opportunity to plead to a lesser offense, if done so at the earliest stage of the case. Like the district court, we find absolutely nothing wrong (and, quite frankly, a great deal right) with such a practice. The policy benefits the government and the court system by relieving court congestion.

United States v. Estrada-Plata, 57 F.3d 757, 761 (9th Cir. 1995).

The results of these charging policies are readily apparent. In the Ninth Circuit, the number of Section 1326 prosecutions increased

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[18]Allen D. Bersin, "Reinventing Immigration Law Enforcement In The Southern District Of California," Federal Sentencing Reporter, Vol. 8, No. 3 (March/April 1996) at 256; Dave Hogan, "Illegal Reentry Cases Soar In Oregon," *The Oregonian*, March 6, 1995, at B-1.

from 399 to 1,835 between 1991 and 1996. Of the 1,436 increase in sentences, 876 (61%) of the cases were from the District of Oregon and the Southern District of California.

Congress acted rationally and well within the scope of historical practice in providing prosecutors with several crimes that could be applied to a single fact situation. Section 1326 should be construed consistently with the separation of powers doctrine to provide the executive branch with wide discretion in charging criminal aliens.

D. Construction Of Subsections (b)(1) And (b)(2) As Separate Offenses Respects The Rights To Grand Jury Indictment And Proof Of Elements Beyond A Reasonable Doubt.

Section 1326 should be read consistently with historical, procedural, and constitutional requirements of indictment and proof. Due process and the Sixth Amendment require that the government prove, and the jury find beyond a reasonable doubt, each element of an offense. *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *In re Winship*, 397 U.S. 358 (1970). Criminal statutes routinely require proof of a prior conviction beyond a reasonable doubt. *See Lewis v. United States*, 445 U.S. 55 (1980); *Moore v. Missouri*, 159 U.S. 673, 676-77 (1895); LaFave and Scott, 1 SUBSTANTIVE CRIMINAL LAW (West 1986) §1.8

at 69.

The Fifth Amendment requires that federal felonies be charged by indictment. U.S. Const. amend. V.[19] The traditional requirements that every ingredient of an offense must be charged and proved beyond a reasonable doubt are of ancient provenance. *United States v. Gaudin*, 115 S.Ct 2310, 2313-15 (1995); *Smith v. United States*, 360 U.S. 1, 9 (1959).[20]

The historical practices have coalesced into federal procedural rules which require an indictment stating the essential facts constituting the offense charged (Fed. R. Crim. P. 7(c)(1)) and, at the time of a guilty plea (not sentencing), advice regarding the nature of the charge and maximum punishment (Fed. R. Crim. P. 11(c)(1)). The Court has recognized that elements that increase statutory maxima are subject to constitutional protections. *McMillan v. Pennsylvania*, 477 U.S. 79, 87-88 (1986); *Mullaney*, 421 U.S. at 698-99. The elements interpretation of subection 1326(b) is supported by constitutional,

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[19]*Cf. Graham v. West Virginia*, 224 U.S. 616, 627 (1911) (prior conviction could be charged by information because right to grand jury indictment is inapplicable to the states under *Hurtado v. California*, 110 U.S. 516 (1884)).

[20]*See Patterson v. New York*, 432 U.S. 197, 215 (1977); 1 Stephen, A HISTORY OF THE CRIMINAL LAW OF ENGLAND, at 281 (1883).

procedural, and historical norms.

E. The Decisions From Other Circuits Misapply Controlling Rules Of Construction.

The circuit courts outside the Ninth Circuit have found subsection 1326(b) creates a "sentence enhancement." *United States v. Valdez*, 103 F.3d 95, 97-98 (10th Cir. 1996) (citing cases). The plain meaning of the statute and its context contradict that position. Two of the leading cases adopt an incorrect analysis in reaching their conclusion.

1. The Fifth Circuit, And Those Relying on It, Adopted An Analysis Unsuited To The Question Before The Court.

In *United States v. Vasquez-Olvera*, 999 F.2d 943, 945 (5th Cir. 1993), *cert. denied*, 510 U.S. 1076 (1996), the Fifth Circuit, in both the majority opinion and the dissent, adopted an analytical framework based on an Armed Career Criminal Act case, *United States v. Davis*, 801 F.2d 754 (5th Cir. 1986). The *Davis* court, in turn, derived its analysis from *Garrett v. United States*, 471 U.S. 773 (1985). *Davis*, 801 F.2d at 756. Although there is overlap, the *Davis/Vasquez-Olvera* approach is not helpful in the present case.

In *Garrett*, this Court considered whether proof of facts

supporting a predicate offense for a Continuing Criminal Enterprise conviction violated the Double Jeopardy Clause. The Court did not purport to create a methodology for determining what ingredients of an offense must be pleaded and proved. The double jeopardy analysis sheds little light on the construction of Section 1326. Mr. Almendarez is not arguing that his prior burglary conviction forecloses prosecution as a matter of double jeopardy.

As stated by the *Vasquez-Olvera* dissent, the *Garrett* methodology reaches the result Mr. Almendarez seeks: 1) incorporation by reference renders subsection 1326(b) a unitary offense; 2) the degree of increase forecloses treatment as a multiplier; 3) the title does not create a separate penalty provision; and 4) as all agree, no separate procedures are provided. *Vasquez-Olvera*, 999 F.2d at 948-49. The same result is achieved through the plain meaning and context of the statute, informed by the strict construction of criminal statutes and the rule of lenity.

2. The First Circuit, And Those Relying On It, Failed To Apply The Applicable Policies Requiring Treatment Of Subsections (b)(1) and (b)(2) As Separate Offenses.

The First Circuit found Section 1326 to be ambiguous based

on its language and structure. *United States v. Forbes*, 16 F.3d 1294, 1298 (1st Cir. 1994). Then, instead of applying the rules for construction of ambiguous criminal statutes, the court found the policy against introduction of prior convictions to be decisive. *Forbes*, 16 F.3d at 1299-1301.

Once ambiguity is found, the narrow construction of criminal statutes and the rule of lenity require relief for the defendant. This Court requires strict construction of what constitutes a crime under the immigration laws. *United States v. Campos-Serrano*, 404 U.S. 293, 297-98 (1971). The definition of criminal offenses is also subject to the rule of lenity, whereby the interpretation saving the individual defendant from prison is favored. *Granderson v. United States*, 511 U.S. 39, 54 & n.12 (1994); *Ratzlaff v. United States*, 510 U.S. 135, 148 (1994); *United States v. R.L.C.*, 503 U.S. 291, 305 (1992).

Even beyond Mr. Almendarez's particular circumstances, the policies cited by the *Forbes* court incorrectly balance the interests of defendants generally. The constitutionally-based interests in grand jury indictment and proof beyond a reasonable doubt alone override other interests. The dangers posed by proof of prior convictions have been substantially mitigated by the Court's ruling in *Old Chief v. United*

States, 117 S.Ct. 644 (1977) (stipulation to conviction obviates proof of the offense). In 1996, 98.2% of all Section 1326 defendants pleaded guilty. The number of defendants going to trial is minuscule compared to those benefitting from charging discretion or defenses based on the elements of the offenses.

CONCLUSION

The plain meaning of the statute is that subsections 1326(b)(1) and (b)(2) describe separate offenses. This result is strongly supported by the structure of the statute, traditional charging discretion, and constitutional norms. The sentence in excess of the statutory maximum of two years should be reversed.

Respectfully submitted,

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